

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel.
W. A. DREW EDMONDSON, in his capacity as
ATTORNEY GENERAL OF THE STATE OF
OKLAHOMA and OKLAHOMA SECRETARY
OF THE ENVIRONMENT C. MILES TOLBERT,
in his capacity as the TRUSTEE FOR NATURAL
RESOURCES FOR THE STATE OF OKLAHOMA,**

Plaintiff,

vs.

05-CV-0329 TCK-SAJ

**TYSON FOODS, INC., TYSON POULTRY, INC.,
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,
AVIAGEN, INC., CAL-MAINE FOODS, INC.,
CAL-MAINE FARMS, INC., CARGILL, INC.,
CARGILL TURKEY PRODUCTION, LLC,
GEORGE'S, INC., GEORGE'S FARMS, INC.,
PETERSON FARMS, INC., SIMMONS FOODS, INC.,
and WILLOW BROOK FOODS, INC.,**

Defendants.

**TYSON FOODS, INC., TYSON POULTRY, INC.,
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,
GEORGE'S, INC., GEORGE'S FARMS, INC.,
PETERSON FARMS, INC., SIMMONS FOODS, INC.,
and WILLOW BROOK FOODS, INC.,**

Third Party Plaintiffs,

vs.

City of Tahlequah, *et al.*,

Third Party Defendants

**DEFENDANTS/THIRD PARTY PLAINTIFFS' REPLY TO
PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION FOR
MISCELLANEOUS RELIEF – REQUEST FOR ESTABLISHMENT OF
PROCEDURE FOR ENTRY OF CASE MANAGEMENT ORDER**

Defendants/Third Party Plaintiffs, Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc. and Willow Brook Foods, Inc. (hereinafter the "Defendants"), hereby submit their Reply to Plaintiffs' Response in Opposition to their Motion for Miscellaneous Relief (Original Motion at Dkt. No. 425) in further support of their request that the Court establish a procedure and deadlines for actions to be taken by the parties in anticipation of a scheduling conference for the purpose of entering a Case Management Order, and set the date and time for such conference to permit the participation of the Third Party Defendants.

ARGUMENTS AND AUTHORITIES

Through their Motion, Defendants took the initiative to further the orderly progress of this litigation. Defendants proposed a logical and fair process for the Court's consideration that will lead to the entry of a Case Management Order that should encompass the complexities of the case and address the concerns of the primary parties as well as the Third-Party Defendants. Plaintiffs object to this procedure, however, claiming that the Defendants' proposal will somehow delay their ability to pursue their claims. Plaintiffs' opposition lacks foundation, ignores the scope of the litigation, and most importantly, offers no other alternatives for case management.

1. *PLAINTIFFS MISAPPREHEND DEFENDANTS' PROPOSAL*

Plaintiffs' Response reflects that they fail to comprehend the procedure the Defendants proposed to the Court. Plaintiffs complain that "[i]ndeed, the requirement that there be a case management order in place prior to a scheduling conference only

serves to delay the holding of a scheduling conference,” (Ps’ Resp. at 5), suggesting that the Defendants requested a multi-step process. As clearly set forth in the Motion, Defendants requested that the Court hold one conference for the purpose of entering a Case Management Order, and that this conference occur with the full participation of the Third-Party Defendants. Plaintiffs, on the other hand, seemingly request that the Court hold an immediate scheduling conference, enter a scheduling order, and then enter a Case Management Order at some later time. Not only would the Plaintiffs’ proposed procedure result in a scheduling order of questionable value and durability, it would waste the resources of the Court and the parties by doing twice that which can be accomplished by the Defendants’ instant request with one conference and one Order involving all of the parties.

2. *PLAINTIFFS’ RESPONSE IGNORES THE SCOPE OF THE LITIGATION*

In their call for an immediate scheduling conference, Plaintiffs continue to bury their heads with regard to the scope of the litigation they have set into motion. Plaintiffs attempt to characterize this case as a simple one against only the primary Defendants for alleged harm resulting from the use of poultry litter within the Illinois River Watershed (“IRW”). Although, as Plaintiffs assert, they may be the “master of [their] Complaint and claims,” (Ps’ Resp. at 2), the federal rules define what is relevant and the extent of the third party claims that may derive therefrom. Since the alleged common harm underlying Plaintiffs’ claims, if established, has a multitude of potential sources in the IRW other than poultry farming, the Defendants are entitled to pursue evidence of these

other potential sources, which is relevant both to their defenses against causation, and to establish the liability of the owners and operators of these sources.¹

Plaintiffs blithely assume that all matters associated with the Third-Party Defendants can be deferred until after the trial of their claims against the primary Defendants and that “the third-party defendants would be proceeding on an entirely different schedule from the State.” (Ps’ Resp. at 5.)² Yet, their naïve perspective and misplaced argument fail to recognize that all of the evidence related to these non-poultry operations will almost certainly be presented in the Defendants’ case-in-chief; and therefore, the full range of discovery against the named Third-Party Defendants (and potentially many other unnamed source operators) must go forward within the management scheme of the entire case in preparation for trial. This is true regardless of

¹ Plaintiffs attempt redirection by asserting that the actions of the Third-Party Defendants are “wholly unrelated to the improper actions of the Poultry Integrator Defendants that are at issue in this case,” (Ps’ Resp. at 3), but their argument falls flat at the feet of their claims of joint and several liability and the alleged resulting indivisible injury from common substances found in nature and which derive from all living beings and numerous types of agriculture and industry. Plaintiffs may prefer to prosecute a case about phosphorus from poultry litter, but phosphorus is phosphorus, and therefore, this case is also about commercial fertilizer, municipal sewage, livestock manure, septic systems, poor land management and erosion, and the State of Oklahoma’s failure to implement a comprehensive watershed management plan to address all of these other nutrient sources.

² Plaintiffs would apparently like to decide this question for the Third-Party Defendants. While many of them may wish to have the third-party claims bifurcated for trial, some may be reluctant to be absent from the trial proceedings while the Defendants present evidence about their operations. Accordingly, this is a question of case management that should not be decided without all of the interested parties participating.

when the Court determines that the question of the Third-Party Defendants' liability should be decided.³

3. *DEFENDANTS' PROPOSED PROCESS WAS NEITHER SOUGHT FOR NOR WILL IT RESULT IN DELAYING THE PROGRESS OF THE CASE*

Plaintiffs dedicated an overabundance of their Response to arguing that the Defendants' proposed process for the entry of a Case Management Order would delay the prosecution of their case, yet they failed to articulate any specific example of how the proposed process will impair them whatsoever.⁴ For example, have Plaintiffs asserted that their ability to obtain initial disclosures from the primary Defendants has been deterred? They have not. In fact, the parties to the first Joint Status Report have exchanged initial disclosures, and have agreed on a date to produce the documents identified therein. Have Plaintiffs complained that they will be frustrated in pursuing discovery? To the contrary, they have served all of the primary Defendants with an initial set of interrogatories and requests for production of documents, and they are vigorously pursuing the ability to enter the lands of non-parties to conduct environmental sampling. Have Plaintiffs provided the Court with an example of even one step in the development of their case on the merits that will be hindered by waiting until the

³ Although Plaintiffs continue to argue in their Response that Defendants' third-party claims should be dismissed, Defendants have fully briefed the Court on the error of Plaintiffs' analyses in their Response to Plaintiffs' Motion to Sever and Stay and/or Strike or Dismiss the Third Party Complaint (Dkt. No. 495), and maintain that this issue is not dispositive of the process the Court should employ to move forward to the entry of a Case Management Order.

⁴ Defendants suggest that Plaintiffs should be a bit more circumspect when making the charge of delay given that the lawsuit was filed in June of 2005, and Plaintiffs never sought to advance their cause by requesting the Defendants to participate in a Rule 26(f) conference for the purpose of submitting a Joint Status Report as required by LCvR16.1(a)(1) and (b)(1)(A).

Defendants and the Third-Party Defendants can hold a Rule 26(f) conference, thereby allowing the Third-Party Defendants the full opportunity to be heard during the development of the Case Management Order? Of course not, Defendants' proposal will benefit all of the parties, including Plaintiffs, by organizing, structuring and advancing this lawsuit. Given the lack of any counter-proposal from the Plaintiffs, the Defendants respectfully request that their proposal be adopted.

CONCLUSION

Plaintiffs have simply failed to present the Court with a reasoned or well-founded objection to the process proposed by the Defendants, which will permit all of the parties, including the Third-Party Defendants, to be heard in the process of developing and entering a Case Management Order. Plaintiffs have also elected not to provide the Court with any alternative proposal. Accordingly, Defendants request the Court sustain their Motion and enter the proposed order submitted therewith.

Respectfully submitted,

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